STATE OF MICHIGAN

COURT OF APPEALS

RICHARD T. GREELEY, JOHN GREELEY, and ALLAN GREELEY, Plaintiffs-Appellants, v TOWNSHIP OF MULLETT and COUNTY OF CHEBOYGAN, Defendants-Appellees,	UNPUBLISHED February 14, 2012 No. 299941 Cheboygan Circuit Court LC No. 09-007928-CH
RICHARD T. GREELEY, JOHN GREELEY, and ALLAN GREELEY, Plaintiffs-Appellants, v TOWNSHIP OF MULLETT and COUNTY OF CHEBOYGAN, Defendants-Appellees.	 No. 301460 Cheboygan Circuit Court LC No. 09-007928-CH

Before: SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's decisions granting defendants' motions for summary disposition and granting defendants' motions for attorney fees and costs on the basis that plaintiffs' action was frivolous. We affirm.

Plaintiffs own a parcel of property located in defendant Mullett Township (the township) comprised of four lots in the Long Point Resort Grounds subdivision. In 1991, this Court reviewed the appeal of plaintiffs' predecessor in interest regarding a dispute with her neighbors in the subdivision over the boundary lines of her property. This Court found that the boundary

lines of the property could not be determined because none of the original monuments on the plat could be located.[1] Plaintiffs purportedly brought this suit to enjoin the township and defendant Cheboygan County (the county) from exercising their rights to assess, levy, and collect taxes against the property and to issue zoning and building permits to property owners within Long Point Resort Grounds, respectively, so long as the boundary lines of their property remained undetermined. Plaintiffs apparently sought to "strong arm" defendants into ordering an assessor's plat to determine the boundary lines of their property. However, the circuit court granted defendants' motions for summary disposition following an oral hearing, and also granted defendants' motions for attorney fees after a later hearing on the grounds that plaintiffs' claims were frivolous.

On appeal, plaintiffs' many arguments essentially boil down to their belief that the circuit court's decision to grant summary disposition was incorrect because: 1) the circuit court improperly reviewed their request for a permanent injunction under the standards for determining whether a preliminary injunction should be issued; 2) an injunction was appropriate because plaintiffs lacked an adequate remedy at law; and 3) the court improperly granted defendants' motions for attorney fees.

In plaintiffs' first amended complaint they sought an injunction against the township, without specifying whether it should be temporary or permanent, against the assessment, levy and collection of all real estate taxes upon the premises. Plaintiffs also requested that an injunction be entered "both temporally and permanently" against the county to enjoin it from issuing any zoning variances, permits, or building permits to the other property owners in the subdivision where plaintiffs' property was located. Plaintiffs argue on appeal that the trial court committed error requiring reversal by analyzing their case using the test for a preliminary injunction when they had requested a permanent injunction. We disagree.

In denying plaintiffs' claim, the circuit court stated that it had evaluated plaintiffs' request for a permanent injunction using the following criteria:

> Number one is whether the injunction would harm the public interest. Number two is whether the harm to the plaintiff in the absence of an injunction would outweigh the harm to the defendant if the injunction were to be granted. Third, whether the plaintiff is likely to succeed on the merits and whether the plaintiff will be irreparably harmed if an injunction is not issued.

In *Detroit Firefighters Ass'n IAFF Local 344 v Detroit*, 482 Mich 18; 753 NW2d 579 (2008), our Supreme Court has set forth a slightly expanded list of elements from that announced by the circuit court that a party must establish when requesting a preliminary injunction:

> (1) [T]he moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm

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[1] *Greeley v Coltson, et al*, unpublished per curiam opinion of the Court of Appeals, issued March 22, 1991 (Docket No. 111866).

> it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued. [*Id*. at 34.]

In *Kernan v Homestead Dev Co*, 232 Mich App 503; 591 NW2d 369 (1998), this Court stated that a circuit court should consider seven factors in evaluating a party's request for a permanent injunction:

> (a) the nature of the interest to be protected,
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> (b) the relative adequacy to the plaintiff of injunction and of other remedies,
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> (c) any unreasonable delay by the plaintiff in bringing suit,
>
> (d) any related misconduct on the part of the plaintiff,
>
> (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,
>
> (f) the interests of third persons and of the public, and
>
> (g) the practicability of framing and enforcing the order or judgment. [*Id*. at 514-515.]

The *Kernan* Court also stated that a circuit court must "balance the benefit of an injunction to plaintiff against the inconvenience and damage to defendant, and grant an injunction or award damages as seems most consistent with justice and equity under all the circumstances of the case." *Id.* at 514 (citations and internal quotation marks omitted).

Although the test announced by the circuit court in the instant case for evaluating plaintiffs' request for permanent injunction shares three of the four elements from *Detroit Firefighters*' preliminary injunction test, it is clear from the record that the court understood that plaintiffs were requesting a permanent and not a preliminary injunction. While the court's statement of the test was not identical to the permanent injunction test set forth in *Kernan*, the court did discuss many of the elements from *Kernan* in stating its decision on the record. Furthermore, *Kernan* does not indicate that the list of factors to consider was intended to be exhaustive, or that each element suggested must be included by the circuit court in every analysis of a request for a permanent injunction. Plaintiffs' claim that the court improperly analyzed their request according to the standards for a preliminary injunction rather than a permanent injunction lacks merit, as plaintiffs do not point to specific holes in the court's analysis, nor do they specify the factors that they claim the court failed to consider.

In plaintiffs' amended complaint (filed before their first amended complaint), in addition to requesting an injunction be entered against the township's assessment, levying, or collection of taxes against their real property, plaintiffs also alleged that under the Land Division Act (LDA), MCL 560.101 *et seq.*, the court should require the township to re-plat their subdivision following an assessor's plat, which would be the more "practical remedy." In fact, plaintiffs

should have properly brought an action under the statute as an available remedy at law, precluding them from requesting and receiving an injunction against the township. In their first amended complaint, however, plaintiffs abandoned this argument, stating instead that they had no adequate remedy at law and were thus entitled to injunctive relief, which would restrain the township from assessing taxes against the property. Plaintiffs renew this argument on appeal. They also claim on appeal that the court should not have considered plaintiffs to have a remedy at law under the LDA without first determining whether such a remedy would be "adequate, complete and certain." We disagree.

The circuit court properly concluded that injunctive relief for plaintiffs' claim against the township was not appropriate for several reasons. First, the court noted that plaintiffs had failed to establish the elements required for a court to issue a permanent injunction. Second, the court found that the law which granted the township the authority to assess taxes did not require the assessor to be able to identify the boundary lines on a property in order to assess taxes on the property. Third, the court found that it lacked subject matter jurisdiction over plaintiffs' claim against the township, as taxation claims were within the exclusive jurisdiction of the Michigan Tax Tribunal. Additionally, the court found that other remedies were available to plaintiffs, including an action brought under the LDA. Alternatively, the court suggested that plaintiffs "start suing your neighbors and domino effect has everybody suing everybody."

Section 201(1) of the LDA, MCL 560.201(1), provides that an assessor's plat may be ordered when either of the following conditions exist:

> (a) When a parcel or tract of land is owned by 2 or more persons.
>
> (b) When the description of 1 or more of the different parcels within the area cannot be made sufficiently certain and accurate, or are deemed excessively complicated by the governing body, for the purposes of assessment and taxation without a survey or resurvey.

The statute provides that in situations like plaintiffs', where one or more parcels in an area cannot be determined with certainty or accuracy, an assessor's plat may be ordered. Plaintiffs do not explain why this remedy would not be sufficient. Instead, plaintiffs argue that it was the burden of the trial court to show that a potential remedy at law be adequate, complete, and certain before dismissing plaintiffs' request for an equitable remedy. This is not a correct statement of the law.

Injunctive relief is '"an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury."' *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 15; 654 NW2d 610 (2002), quoting *Jeffrey v Clinton Twp*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992). The burden of proving these elements belongs to the moving party, and there is no requirement that the court show that potentially available adequate remedies at law be complete and certain, as plaintiffs claim. In support of their argument, plaintiffs cite *Walker v Walker*, 330 Mich 332; 47 NW2d 633 (1951). In *Walker*, our Supreme Court was asked to reverse the trial court's decision on a property settlement in a common law divorce case. *Id.* at 335. The Court declined to reverse the trial court's decision, despite the defendant's argument that it was improper because the plaintiff had an adequate remedy at law, such that the equity court could not take jurisdiction. *Id.* The

Court responded to the defendant's argument that it had expressly directed the plaintiff in the divorce case "to pursue her remedies *under the general chancery jurisdiction.*" *Id.* (emphasis in original). Moreover, the Court noted that

> the defendant induced the plaintiff to enter into the supposed status of a common-law marriage. The defendant has been unjustly enriched to the extent of plaintiff's contributions to the value of the property he seeks to retain. Justice requires that the Court dispose of the property rights of these parties without further multiplicity of suits. Under the circumstances of this case, defendant's claim that equity does not have jurisdiction stands only as a stumbling block in the path of justice, without substantial merit, and we are not in accord with the defendant's claim that plaintiff's sole remedy is in the law side of the Court.
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> Appellant claims that plaintiff could obtain full relief, if entitled thereto, in an action of replevin, and that equity has no jurisdiction if plaintiff has an adequate remedy at law. However, *the test of equitable jurisdiction is not whether there is an alternative remedy at law, but whether the remedy at law is as adequate, complete and certain as the relief in equity*. [*Id*. at 336 (emphasis added).]

Plaintiffs cite the court's statement that equitable jurisdiction is only appropriate where the available alternative remedy at law is "as adequate, complete and certain as the relief in equity." *Id.* However, the facts of *Walker* are completely inapposite to the instant case. In addition, the *Walker* Court's discussion of the rules of a court at chancery as opposed to those of a court at law appears to be outmoded, per the Revised Judicature Act (RJA) of 1961 and the Michigan Constitution of 1963.

In the RJA, the Legislature provided that the circuit courts were to have jurisdiction over actions that previously would have been brought before either courts at common law or courts in chancery. MCL 600.601(1)(a), (b). Similarly, the Michigan Constitution provides in relevant part that "[t]he supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. The distinctions between law and equity proceedings shall, as far as practicable, be abolished." Const 1963, art 6, § 5. Plaintiffs' reliance on *Walker* for the distinctions it makes between remedies at law and equitable remedies is misplaced. Because plaintiffs do not cite any relevant caselaw to support their argument that the court was required to grant plaintiffs' request for an injunction unless it could show that the alternative remedy at law was complete and certain, their claim as to the township must fail. Because plaintiffs' claim with respect to the county and its issuance of zoning compliance and building permits is virtually identical, this claim also fails.

Finally, plaintiffs argued before the circuit court that defendants were not entitled to attorney fees because fees were not authorized by applicable court rules. Plaintiffs also claimed that the circuit court lacked the authority to award fees because plaintiffs filed a claim of appeal in this Court following the court's entry of judgment and before defendants filed their motions for attorney fees. Thus, according to plaintiffs, an award of attorney fees would constitute an amendment of the court's previous judgment that it could not make pursuant to MCR 7.208(A). Plaintiffs do not renew this argument on appeal, but argue instead that the court's order for

attorney fees was based on a misunderstanding of plaintiffs' amended complaint and their requested relief. We disagree and affirm the circuit court's decision as to this issue.

Plaintiffs note correctly that the circuit court misstated the nature of their claim against the township during the hearing on defendants' motions for attorney fees. The court incorrectly summarized plaintiffs' claim as seeking "an injunction against the township of Mullett and Cheboygan County from levying any new assessments against every parcel within this whole development." As previously discussed, plaintiffs requested an injunction against the township's assessment, levying, or collection of taxes on their parcel, not every parcel in their plat. However, it is not clear to us that the court's decision to grant attorney fees to the township was based on this misstatement during the hearing. The court correctly summarized the issue when it delivered its decision during the hearing on the parties' motions for summary disposition. In addition, the court stated that its reason for granting attorney fees to the township was that plaintiffs' claim had no legal basis, which still holds true with respect to plaintiffs' actual claim for the reasons discussed above.

Our Supreme Court has held that "the general 'American rule' is that 'attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary.'" *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008), quoting *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998). The circuit court cited MCR 2.625 and MCL 600.2591 in its decision to grant defendants' motions. Both the statute and the court rule permit the court to award attorney fees if it finds that an action was frivolous. See MCR 2.625(A)(2); MCL 600.2591(1). Under MCL 600.2591(3)(a), an action is "frivolous" when one of the following conditions exists:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

The circuit court correctly determined that it had no authority to grant plaintiffs' request for an injunction against the township's right to assess, levy, and collect property taxes against plaintiffs' parcel. Plaintiffs' underlying problem, that they were unable to determine the boundary lines of their property, would not have been remedied by an injunction. Moreover, plaintiffs asked the court to establish an assessor's plat in their amended complaint, which demonstrated that they were aware of the remedies at law available to them. Plaintiffs abandoned this argument in their first amended complaint and asked instead for an injunction. Although the circuit court was incorrect in stating that plaintiffs asked for injunctive relief from taxation for all of the property owners in their subdivision, the court's finding that their action against the township was frivolous was not error.

Similarly, the court's decision in favor of the county's request for attorney fees was not error. Plaintiffs claim, incorrectly, that the circuit court characterized their action against the county as seeking to restrain the other property owners in their plat rather than the county from obtaining building permits. In fact, the court stated during the hearing on defendants' motion for

attorney fees that plaintiffs "wanted to have an injunction against all [of the] property owners in this development that none of them could secure a building permit until [plaintiffs] resolved their issue." Plaintiffs' characterization of the court's statement as a misapprehension of the issue is disingenuous.

The court's statement refers to the fact that if it had issued an injunction against the county at plaintiffs' request, none of their neighbors would have been able to obtain building permits from the county. The court's statement also refers to the loss of rights that would have been occasioned on the other property owners within the plat if the court had granted the injunction, and does not reflect the court's belief that plaintiffs sought an injunction against the property owners' right to seek permits rather than against the county's right to issue them. The circuit court's decision to award attorney fees was not error.

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Amy Ronayne Krause